No. 91-1199

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

**YOUNG & RUBICAM, INC.,**
*Petitioner/Cross-Respondent,*

*vs.*

**BETTE MIDLER,**
*Respondent/Cross-Petitioner.*

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Ninth Circuit err in affirming the District Court's Order of partial summary judgment precluding Bette Midler from seeking punitive damages at the trial in this case?

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## OPINIONS BELOW

There have been five opinions below in this matter:

1. Bette Midler v. Young & Rubicam, Inc. (9th Cir. 1991) (September 20, 1991) (Hug J., Tang J., Noonan J.) (Memorandum and Order) (Affirming the grant of partial summary judgment to Young & Rubicam, Inc. on the issue of punitive damages and judgment at trial which had been the subject of a cross-appeal.

2. Bette Midler v. Young & Rubicam, Inc. (February 8, 1989) (Fernandez, J.) (Granting plaintiff's motion for partial summary judgment and granting Defendants' motion for partial summary judgment on the issue of punitive damages.)

3. Bette Midler v. Ford Motor Company and Young & Rubicam, 849 F.2d 460 (9th Cir. 1988) (June 22, 1988) (Hug. J., Tang, J. and Noonan, J., opinion by Noonan, J.) (Reversing District Court's order in part which granted summary judgment for Defendants.)

4. Bette Midler v. Ford Motor Company and Young & Rubicam, CV 86-2683 (C.D. Cal. 1987) (August 12, 1987) (Fernandez, J.) (Statement of Uncontroverted Facts and Conclusions of Law) (Granting summary judgment for Defendant on all claims, denying Plaintiff's motion for summary judgment.)

5. Bette Midler v. Ford Mctor Company and Young & Rubicam, (Hug J., Tang J., Noonan J.) ( August 26, 1988) (Denying Defendants' request for rehearing en banc.)

The opinions have been reproduced in the Appendix to Young & Rubicam, Inc,'s petition for writ of certiorari Docket No. 91-1002.

## STATEMENT OF JURISDICTION

This is an action for violation of rights under California law. The District Court had jurisdiction pursuant to 28 U.S.C. §1332, based on diversity of citizenship and claims exceeding $10,000 exclusive of interest and costs. Following the entry of final judgment by the District Court on October 30, 1989, an appeal was filed by cross-petitioner Bette Midler on November 29, 1989, pursuant to Federal Rule of Appellate Procedure 4(a)(2) and a cross-appeal was filed by cross-respondent Young & Rubicam, Inc. on December 13, 1989. The Court of

Appeals issued its order affirming the order appealed on September 20, 1991.

Young & Rubicam, Inc. filed a petition for writ of certiorari from the Court of Appeals September 20, 1991 order on December 19, 1991. Bette Midler received a copy of Young & Rubicam, Inc.'s petition for writ of certiorari on December 23, 1991. Bette Midler submits this cross-petition for writ of certiorari pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 3294(a) of the California Civil Code provides that:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that

> the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Section 3294(c) of the California Civil Code provides that:

> As used in this section, the following definitions shall apply:
>
> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust harship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

## STATEMENT OF THE CASE

This action arose out of the television broadcast of commercial adver-

tisements for Lincoln-Mercury automobiles in 1986. Young & Rubicam, Inc. designed the advertisements to convey the impression that Bette Midler was singing for their commercial. (App. A11). Young & Rubicam, Inc. accomplished this deception by utilizing Ula Hedwig, a former background singer for Bette Midler to sound as much like Bette Midler as possible while she was making the recording which was used for the television advertisement. (App. A10.)

Midler commenced this action by filing a complaint on April 29, 1986. (App. A56.) A first amended complaint was filed on May 27, 1986. Midler's first amended complaint alleged the following four substantive causes of action: (1) unfair competition, (2) violation of Midler's right of privacy,

(3) violation of Midler's right of publicity and (4) violation of California Civil Code §3344. (App. A56.) Midler sought compensatory damages, punitive damages, injunctive relief and an accounting of profits.

A cross-motion for summary judgment brought by Young & Rubicam, Inc. on Midler's first amended complaint was granted by the District Court on July 13, 1987 on the grounds "that Plaintiff has no protectable rights under the laws of California." (App. A60.)

On June 22, 1988, the Ninth Circuit reversed the District Court order granting Young & Rubicam, Inc.'s motion for summary judgment. Midler v. Ford Motor Co., 849 F.2d 460, (9th Cir. 1988) (App. A41.) ("Midler I"). The Midler I court held:

> We hold that when a distinctive voice of a professional singer is

> widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California. (App. A48).

Subsequent to the Midler I decision Young & Rubicam, Inc.'s brought a motion for partial summary judgment with respect to Bette Midler's claim for punitive damages. Bette Midler opposed Young & Rubicam, Ic.'s motion for partial summary judgment by submitting evidence that Young & Rubicam, Inc. had engaged in fraudulent conduct entitling Bette Midler to an award of punitive damages under California Civil Code §3294. In an order dated February 8, 1989 the District Court granted Young & Rubicam, Inc.'s motion for partial summary judgment without any discussion of the evidence of Young & Rubicam, Inc.'s fraudulent conduct. (App. A34-37.)

Bette Midler's motion for reconsideration was denied on September 25, 1989. (CA. App. ER at 229.)

The jury trial in this action commenced on October 24, 1989. The District Court charged the jury with determining the following facts only:

> (1) Whether Young & Rubicam, Inc. deliberately imitated Bette Midler's voice in producing Ford Motor Company's Sable automobile television commercial, and, if the answer to the first question is "Yes", then,
>
> (2) The fair market value of Bette Midler's voice. (C.A. App. SER at 118.)

The jury found that Young & Rubicam, Inc. had deliberately imitated Bette Midler's voice in its television commercial and returned a verdict in Bette Midler's favor in the amount of $400,000.

On November 29, 1989 Midler filed a notice of appeal with respect to the

trial court's order granting Defedants' summary adjudication on the punitive damages issue. Defendant Young & Rubicam, Inc. filed a cross-appeal on December 13, 1989. In a September 20, 1991 opinion the Ninth Circuit Court of Appeals affirmed the District Court's order precluding Plaintiff from seeking punitive damages at trial ("Midler II").

## REASONS FOR GRANTING CROSS-PETITION FOR WRIT OF CERTIORARI

The Ninth Ciruit's decision in Midler II upholding the District Court's order of partial summary judgment as to Bette Midler's claims for punitive damages is in conflict with the opinion in National Bank of Commerce v. Shaklee Corporation, 503 F.Supp. 533 (W.D. Texas 1980) and the

Ninth Circuits own decisions. Furthermore, Midler II tends to erode Plaintiff's statutory rights under California Civil Code §3294 by taking away fraud as a basis for recovery of punitive damages. Finally, the Midler II decision does not adhere to the rules concerning burdens of proof on motions for summary judgment set forth by the court in Celotex v. Catrett, 477 U.S. 317 (1986).

## POINT I

## THE MIDLER I DECISION ERODES PLAINTIFFS' RIGHTS TO RECOVER PUNITIVE DAMAGE UNDER CALIFORNIA LAW

Supreme Court review is warranted to prevent the erosion of a statutory or legal principle. Wilkerson v. McCarthy 336 U.S. 53, 55 (1949). Supreme Court review is also warranted if an error by a lower court has entailed a harsh result. Montana v. Kennedy, 336 U.S. 308, 309 (1961). Here, the Ninth Circuit decision in Midler II erodes plaintiffs' rights to seek punitive damages under California Civil Code Section 3294.

California Civil Code Section 3294 provides that a plaintiff may recover punitive damages in any tort action on the following basis:

> In an action for the breach of an obligation not arising from con-

> tract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. California Civil Code Section 3294(a) (emphasis added)

For the purposes of recovering punitive damages under California Civil Code Section 3294 fraud is defined as follows:

> "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. California Civil Code Section 3294(c)(3).

The court in Walker v. Signal Cos., Inc., 84 Cal.App.3d 982, 149 Cal.Rptr. 119 (1958), interpreting California Civil Code Section 3294, held that since the words "oppression,

fraud or malice" were written in the disjunctive, "fraud" alone forms an adequate basis for the award of punitive damages. Indeed, the Ninth Circuit in Glovatorium, Inc. v. NCR Corporation, 684 F.2d 658 (9th 1982).

> There is no requirement under Cal.Civil Code §3294 that malice, reprehensible or outrageous conduct or wilful disregard be shown in addition to the fraud. Id. at 663.

Despite the holding in Glovatorium, the the Court of Appeals in Midler II and the District Court in its February 8, 1989 order granting Young & Rubuicam, Inc.'s motion for partial summary judgment held that Bette Midler was required to provide evidence of "malice" as defined by California Civil §3294. (App. A6-7, A30.) Thus, the lower court decisions in this case have had the harsh result of taking away fraud as a ground for recovering

punitive damages under California Civil Code §3294 away from Bette Midler even though both the statute itself and applicable case law indicate that fraud alone is a sufficient basis for an award of punitive damages.

## POINT II

## THE NINTH CIRCUIT'S OPINION IN MIDLER II IS IN CONFLICT WITH OPINIONS OF COURTS IN OTHER CIRCUITS AS WELL AS ITS OWN OPINIONS ON PUNITIVE DAMAGES

The Midler II holding that fraud alone can not serve as a basis for recovery of punitive damages is in direct conflict with the decision in National Bank of Commerce v. Shaklee Corporation, 503 F.Supp. 533 (W.D. Texas 1980) and the Ninth Circuit's own decisions in Cher v. Forum Inter-

national, Ltd., 692 F.2d 634 (9th Cir. 1982) and Glovatorium, Inc. v. NCR Corp., 684 F.2d 658 (9th Cir. 1982).

In contrast to the instant case, Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir. 1982) and National Bank of Commerce v. Shaklee Corporation, 503 F.Supp. 533 (W.D. Texas 1980) are two right of privacy/publicity cases in which punitive damages were awarded because the defendants had committed a fraud on the public by deceiving the public into believing that a celebrity had endorsed or been associated with their products.

In Shaklee, punitive damages were awarded because the defendants had deceived the public about the association between their product and the plaintiff. The plaintiff in Shaklee was the Estate of Heloise Bowles, the

late author of the newspaper column entitled "Hints from Heloise," which had appeared daily in almost six hundred newspapers in the United States and abroad. Id. at 536. The defendants, Shaklee Corporation, a direct sales organization which manufactures and sells household cleaners, food supplements and cosmetics published a promotional addition of Heloise's book entitled "All Around the House" featuring Shaklee advertisements scattered throughout the book. Id. at 538. The court, applying California law, found that Shaklee's distribution of the book violated Heloise's right of privacy and awarded Heloise's estate punitive damages on the following basis:

> The court is of the opinion and finds that Shaklee's conduct in using Heloise's name was intentionally and cleverly calculated to

> produce the inference that Heloise was associated with, approved and endorsed Shaklee and Shaklee products. This intention is easily discerned from reading the offending materials authored by Shaklee. Id. at 548.

In Cher the defendant, Forum International, Ltd., had violated Cher's right of publicity, by among other things, falsely implying that Cher had endorsed Forum Magazine Id. at 639. The court held that:

> Some exemplary damages can be supported as punishment for the false advertising and promotional misrepresentations of those defendants. Id. at 640.

The Midler II court's decision to preclude Bette Midler from submitting evidence of Young & Rubicam, Inc.'s fraudulent scheme to associate her with their product at trial is inconsistent with the factually similar Shaklee and Cher cases and should be reversed.

## POINT III

## MIDLER II IS INCONSISTENT WITH THIS COURT'S DECISION IN CELOTEX

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986) this court explained the standard to be applied to determine whether the movant has met its summary judgment burden. In a 5-to-4 decision, the majority and the dissent both were in agreement as to how the summary judgment burden of proof operates. 10A C. Wright, A. Miller and Kane, Federal Practice and Procedure (2d ed. Supp. 1983) Section 2727 at 21. Justice Rehnquist, writing for the majority described the movant's initial summary judgment burden as follows:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, deposi-

> tions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Id. at 274.

Here Midler's claim for punitive damages relied in part on the allegations concerning Defendants' fraudulent conduct, a recognized basis for recovery of punitive damages under California Civil Code Section 3294. (See Paragraphs 25 and 33 of the First Amended Complaint, E.R. 1) Although Defendants' motion for partial summary judgment was solely directed to Midler's claim for punitive damages, Defendants neither informed the court that they were attacking the fraud allegations supporting Midler's claims for punitive damages in their moving papers nor did they submit any evidence whatsoever to negate Midler's allega-

tions of fraudulent conduct. (E.R. 15-41, 163-187)

In fact, as set forth elsewhere in brief, Midler had submitted uncontroverted evidence of Defendants' fraudulent conduct thereby supporting her claim for punitive damages. However, under Celotex, Defendants' failure to address a material portion of Midler's punitive damage claims in their motion for partial summary judgment, in itself, constituted grounds for denying the motion as to the fraud allegations supporting the punitive damage claim. At most, the trial court should have granted the motion for partial summary judgment as to the "malice" and "oppression" allegations supporting the punitive damage claims.

## CONCLUSION

For the foregoing reasons, Respondent Bette Midler respectfully requests that her Cross-Petition For Writ of Certiorari be granted

Dated: Los Angeles, California

January 20, 1992

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OCTOBER TERM, 1991

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*Petitioner/Cross-Respondent,*

—v.—

BETTE MIDLER,

*Respondent/Cross-Petitioner.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO CROSS PETITION

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IN THE

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YOUNG & RUBICAM INC.,

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Cross-Respondent,

v.

BETTE MIDLER,

Respondent/
Cross-Petitioner.

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# PETITIONER/ CROSS- RESPONDENT'S BRIEF IN OPPOSITION

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Young & Rubicam Inc., respectfully prays that Bette Midler's cross-petition for writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in

this action on September 20, 1991, be denied.

## STATEMENT OF JURISDICTION

Young & Rubicam Inc.'s, ("Young & Rubicam") attorneys received a copy of Bette Midler's ("Midler") cross petition for writ of certiorari from the Ninth Circuit's opinion in this case on January 24, 1991.

## OPINIONS BELOW

The five opinions below are set forth in Young & Rubicam's petition for writ of certiorari filed December 18, 1991.

## STATEMENT OF THE CASE

While respondent Young & Rubicam respectfully refers the Court to its Statement of the Case in its petition for certiorari, dated December 18, 1991, Young & Rubicam hereby wishes to correct certain misstatements in petitioner Bette Midler's

cross-petition.

First, Young & Rubicam contends that the evidence at trial demonstrated that Young & Rubicam intended to imitate Bette Midler's version of "Do You Want To Dance", not that "Young & Rubicam designed the advertisements to convey the impression that Bette Midler was singing for their commercial." (Cross Petition at 6.)

Midler states that the District Court granted Young & Rubicam's motion for partial summary judgment without any discussion of alleged evidence of Young & Rubicam's fraudulent conduct. However, the District Court did not address evidence of fraudulent conduct because Midler did not submit any evidence of fraudulent conduct to District Court. Midler's "fraud" argument was a last ditch effort that first arose in response to defendant's motion for partial summary judgment. In any event,

plaintiff's complaint contained mere boilerplate allegations of fraud and did not allege misrepresentations that created an inference of fraud.[1]

The District Court properly determined that the facts before it did not state a claim for punitive damages based on either malice or fraud and granted summary judgment. The Court of Appeals did not address plaintiff's new fraud argument in its opinion. (App. at A1).

REASONS TO DENY THE WRIT

The District Court's decision to grant summary judgment on Midler's punitive damages claim was decided correctly under Celotex v. Catrett, 477 U.S. 317 (1986). The Ninth Circuit's decision to uphold the

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[1] See E.R. 7 at ¶25, 8 at ¶3. Citations to the Excerpts of Record before the Ninth Circuit in Midler II are in the form E.R. at __. Citations to the appendix contained in Young & Rubicam's Petition for Certiorari are in the form (App. at A__).

grant of summary judgment on the issue of punitive damages was rightly decided under California law and does not address or affect in any way the question of whether fraud can be the basis for an award of punitive damages under California law.

## POINT I

## MIDLER DID NOT STATE A CLAIM FOR FRAUD UNDER CALIFORNIA LAW WHICH COULD WITHSTAND SUMMARY JUDGMENT

Midler states that her complaint contained allegations of fraud sufficient to withstand summary judgment. However, plaintiff did not (and could not) allege she was in any way misled by or relied on representations made in the commercials, and thus plaintiff could not establish a

cause of action for fraud under California law.[2]

Midler argues that similar allegations of "fraud upon the public" formed the basis for punitive damages in Cher v. Forum International, 692 F.2d 634 (9th Cir. 1982); National Bank of Commerce v. Shaklee Corporation 503 F. Supp. 533 (W.D. Tex 1980), and in Glovatoruim Inc. v. NCR Corporation, 684 F.2d 658 (9th Cir. 1982), and thus the misrepresentations she claimed resulted from the broadcast of the commercial did state a claim.

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[2]"To establish a cause of action for fraud under California law, plaintiff must prove: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages . . . . All of these elements must be present if actionable fraud is to be found; one element absent is fatal to recovery." Okun v. Morton, 203 Cal. App. 3d 805, 828, 250 Cal. Rptr. 220, 234-35 (1988) (emphasis in original).

Midler cites National Bank of Commerce v. Shaklee Corporation, 503 F. Supp. 533 (W.D. Tex. 1980), in support of her assertion that punitive damages may be awarded to a plaintiff based on defendant's misrepresentations even if plaintiff did not believe the misrepresentations and did not rely on them. Midler falsely claims that Shaklee was decided under California law. As the decision clearly states, Texas law governed plaintiff's claim.

Defendants in Shaklee put advertisements for their products throughout a special promotional copy of plaintiff's book and stated that plaintiff was a member of their sales force. While the court awarded $100,000 in compensatory damages and $35,000 in exemplary damages, contrary to plaintiff's suggestion, the exemplary damages were not based on the creation of a suggestion that plaintiff was

"associated" with defendant's product; exemplary damages were based on advertisement copy "authored by" defendant which expressly, and falsely, stated that plaintiff had become part of defendant's sales force. Shaklee, 503 F. Supp. at 537. Nonetheless, Shaklee is wrongly decided. Defendant Shaklee apparently was not aware that its use of plaintiff's name and book were not authorized. Id. Defendant's intent to associate its product with plaintiff cannot be a basis for an award of punitive damages under Texas law if defendant believed it was authorized to make that association. Cf. Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962) (to justify punitive damages defendant's act must "partake . . . somewhat of a criminal or wanton nature").

Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir. 1982), which is also cited by Midler and which actually was decided under California law, does not even mention California Civil Code Section 3294 and is readily distinguishable from the instant action. In Cher, the Court found that defendant used plaintiff's photograph and name in advertisements that were "patently false" and published those advertisements with knowledge that they were false or with reckless disregard of their truth. The advertisement in question suggested that Cher read and endorsed Forum Magazine and stated that Cher would tell Forum things about her love life that she would not tell US Magazine. In fact, Forum knew that Cher had given the interview referred to in the ad to its competitor, US Magazine. Forum purchased the script from the writer who had conducted the interview

when US decided not to run the piece. Exemplary damages were appropriate because the advertisements at issue were patently false and defendants clearly intended to make the patently false statements. Midler's conclusion that the Cher court approved punitive damages based on Section 3294(c)(3) is unfounded. Forum's knowing publication of patently false statements is more appropriately considered malice, a "willful and conscious disregard" of Cher's rights justifying exemplary damages under Section 3294(c)(1).

Midler's reliance on the holding in Glovatoruim Inc. v. NCR Corporation, 684 F.2d 658 (9th Cir. 1982) is surprising, given that Section 3294 was amended following that opinion. Civil Code Section 3294 was amended in 1987 as part of the Willie L. Brown, Jr. - Bill Lockyer Civil Liability Reform Act of 1987 in response to

the overly casual and generous approaches of juries and judges to punitive damages. The definitions of "malice" and "oppression" were made more stringent and the requirement of proof by "clear and convincing evidence" was added.

The heightened evidentiary requirement of "clear and convincing evidence" is a significant constitutional limitation. Reader's Digest Association v. Superior Court, 37 Cal. 3d 244 (1984). The "clear and convincing" standard now embodied in Civil Code Section 3294 has long existed elsewhere in California statutory and case law. See, e.g., California Evidence Code Section 115.

> 'Clear and convincing evidence requires a finding of high probability'. (In re Angela P.) (1981) 28 Cal. 3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].) Such a test requires that the evidence be 'so clear as to leave no substantial doubt'; sufficiently strong to command

> the unhesitating asset of every reasonable mind.' (Sheehan v. Sullivan (1899) 126 Cal. 189, 193 [58 P. 543].

Lillian F. v. Superior Court, 160 Cal. App. 3d 314, 320 (1984).

Midler's assertion that she may seek punitive damages based on fraud under Section 3294(c)(3) even though she was not defrauded would require a significant departure from the common law of fraud.

In the absence of any factual support for the assertion that Young & Rubicam intended to commit fraud when it created the commercial, Midler's claim for punitive damages based on the violation of her right of publicity required proof that Young & Rubicam acted with "malice or oppression" when it created the commercial. But as the court below correctly determined, and as plaintiff now concedes, there is no evidence to suggest that defendant acted

with any "evil motive" and, therefore, punitive damages are not available.

## POINT II

## THE DISTRICT COURT PROPERLY FOLLOWED THE CELOTEX STANDARD

Midler also claims that the District Court erred in dismissing Midler's fraud claim. However, the District Court followed Ninth Circuit law in granting summary judgment to Young & Rubicam. The Ninth Circuit has described the parties' burdens on a motion for summary judgment:

> . . . [W]ith respect to an issue on which the nonmoving party will bear the burden of proof at trial, the moving party is not required to produce evidence showing the absence of a genuine issue of material fact. "Instead, . . . the burden on the moving party may be discharged by 'showing' - that is, pointing out to the evidence to support the nonmoving party's case." [Celotex Corp. v. Cartrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986)]. Once the moving party shows the absence of evidence,

> the burden shifts to the nonmoving party to designate "'specific facts showing that thee is a genuine issue for trial.'" Id. at 2553 (quoting Fed. R. Civ. P. 56(e)).
>
> The nonmoving party may not rely merely on the unsupported or conclusory allegations of her pleadings. Fed.R.Civ.P. 56(e); [citations omitted]. If the non-moving party fails to make a showing sufficient to establish that there is a genuine issue of fact with respect to the disputed element of the party's case, then summary judgment is appropriate. Celotex, 106 S.Ct. at 2552-53 . . . .

Coverdell v. Dept. of Social & Health Services, 834 F.2d 758, 769 (9th Cir. 1987). Young & Rubicam was entitled to summary judgment on Midler's claim for punitive damages because Young & Rubicam did not commit a fraud, there is no evidence to suggest that defendant intended to harm Midler and Young & Rubicam did not and could not willfully and consciously disregard Midler's rights based on conduct

which did not violate any rights recognized under California law prior to Midler I.

## CONCLUSION

For the foregoing reasons, Respondent Young & Rubicam respectfully requests that Petitioner Bette Midler's cross-petition for a writ of certiorari be denied.

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February 21, 1992

Respectfully Submitted,

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